



Arbitration CAS 2017/A/5272 KF Skënderbeu v. Albanian Football Association (AFA), award of 13 April 2018

Panel: Prof. Ulrich Haas (Germany), President; Mr Frans de Weger (The Netherlands); Mr André Brantjes (The Netherlands)

Football

Match-fixing

Scope of discretion for a federation's decision-making bodies to act as a legislator in disciplinary matters

Absence of validity of a new practice with respect to match-fixing which has no legal certainty

1. Article 1 Swiss Civil Code (SCC) establishes a well-known principle in private law according to which a judge must – where the legislator involuntarily failed to regulate the matter and in application of a specific methodology – adjudicate the dispute by developing the law (just like a legislator). Article 1(2) and (3) SCC only apply to the field of civil or private law. Article 134 AFA Disciplinary Code grants the competent authority the discretion to act like a legislator in disciplinary matters. Whether this can be accepted appears questionable. The legal nature of such proceedings is distinct in nature. Certain (but by far not all) principles of criminal law are applied to disciplinary proceedings by analogy (e.g. *lex mitior*). The purpose of disciplinary sanctions is to influence the behaviour of its members, in particular to encourage them not to engage in certain unwanted activity by threatening to sanction them. In order to achieve this goal, there must be clarity for all stakeholders on what constitutes misconduct and equal treatment of all members. In this respect, the criminal law principles of *nullum crimen, nulla poena sine lege scripta et certa*, pursuant to which no sanction may be imposed unless there is an express provision describing in sufficient clarity and specificity, not only the misconduct but also the applicable sanction, is applicable by analogy to disciplinary proceedings. While acknowledging the applicability of the above criminal principle in general terms, it is to be noted that it is not the same high criminal law standards with respect to legal certainty (“Bestimmtheitsgrundsatz”) which applies to disciplinary proceedings. It suffices that the misconduct covered by the respective rule and the sanction applicable to such misconduct be determinable by interpretation. Thus, there remains a scope of applicability for Article 134 AFA Disciplinary Code. However, the margin to act like a legislator in disciplinary proceeding is rather small.
2. Insofar a new practice applied by the federation's Ethics Committee entails that a football club can be sanctioned for the mere reason that suspicions are raised in respect of being indirectly involved in match-fixing, without any concrete substantiation as to why the club acted in a culpable way and without any evidence that its officials or players were involved in match-fixing, such new practice shall be considered not permissible. Such practice, i.e. sanctions based on suspicion, may be

possible in the context of provisional measures, or, as an “administrative” measure or an admissibility requirement for taking part in a competition in order to protect the integrity of such competition, but not for the imposition of a definite disciplinary measure. In view of the conclusion that it is not clear what constitutes the new practice of the federation Ethics Committee and the fact that this new practice was not communicated to the relevant club, the latter cannot be sanctioned based on such new practice. There must be legal certainty and the entities/persons subject to the federation Code of Ethics and Disciplinary Code must know what the practice is. This is all the more true considering the serious detrimental effects of the sanction in question.

I. PARTIES

1. KF Skënderbeu (the “Appellant” or the “Club”) is a professional football club with its registered headquarters in Korça, Albania. The Club is registered with the Albanian Football Association.
2. The Albanian Football Association (the “Respondent” or “AFA”) is the national governing body of football in Albania. AFA is affiliated to the *Union Européenne de Football Association* (“UEFA”) and the *Fédération Internationale de Football Association* (“FIFA”).

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts, as established on the basis of the parties’ written and oral submissions and the evidence examined in the course of the present appeal arbitration proceedings and the hearing. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

A. Background Facts

4. Since 2010, the UEFA Betting Fraud Detection System (the “BFDS”) has identified more than 50 matches involving the Club where the results were allegedly manipulated for betting purposes.
5. On 1 June 2016, UEFA’s Appeals Body rendered a decision against the Club, with, *inter alia*, the following operative part:

“The [Club] is not eligible to play the UEFA Champions League 2016/2017”.

6. On 26 July 2016, following an appeal lodged against this decision by the Club, the Court of Arbitration for Sport (“CAS”) issued an arbitral award (CAS 2016/A/4650), with, *inter alia*, the following operative part:

- “1. *The appeal filed by [the Club] on 14 June 2016 against the decision issued on 1 June 2016 by the Appeals Body of [UEFA] is dismissed.*
2. *The decision issued on 1 June 2016 by the Appeals Body of [UEFA] is confirmed. [...]”*

7. On 21 November 2016, the grounds of the arbitral award issued by CAS were communicated to the parties.

8. On 23 June 2017, the AFA Ethics Committee, issued a decision (the “Appealed Decision”), with the following operative part:

“Pursuant to Article 17, 18 and further of the Code of Ethics and Articles 16, 68/2, 134 and further of the Code of Sport Discipline

DECIDED:

1. *To plead guilty [the Club] for conspiring to influence match results contrary to sports ethics for the 2015/2016 season;*
2. *To remove the “Champion” title to [the Club] for the 2015/2016 season;*
3. *To sanction [the Club] with a fine of ALL 2,000,000.00 (two million Albanian Lek);*
4. *To sanction [the Club] with the reduction of 12 (twelve) points from the classification for the 2016/2017 season;*
5. *This decision may be opposed pursuant to Article 18 of the Code of Ethics”.*

9. On 14 July 2017, the grounds of the Appealed Decision were notified to the Club, determining, *inter alia*, the following:

“After being acquainted with the reasoned decision, the Albanian Football Association has found that some of the suspected fraudulent matches reported by UEFA’s BFDS belong to local competitions and therefore addressed to the Ethics Committee for seeking settlement of the case.

The Ethics Committee, based on the [AFA Disciplinary Code], examined all reports submitted by UEFA’s BFDS.

On 29.09.2016, the Committee became aware that the Prosecution Office of Tirana District Court had initiated criminal proceeding no 6293/2016, causing the suspension of the disciplinary investigation in order to await a possible conclusion from the prosecution authority and to avoid the prejudice of the case.

Considering that the criminal investigation was proceeding slowly and after analysing the disciplinary/ethical nature of the violation that does not necessarily related to the criminal aspect of the offense, the Committee decided to resume the investigation by taking into examination all the reports submitted by BFDS along with the associated film footage.

From BFDS reports, it turns out that the score of the reported games was fixed for betting purposes and that the players (bookmakers) had prior knowledge on that result. Bets shades played for [the Club's] games are extremely suspicious as the players (bookmakers) showed an excessive confidence in the played bets.

[...]

The Court of Arbitration for Sports (CAS) has concluded that UEFA BFDS reports are reliable and sufficient to consider a club or a player involved in match-fixing activities with profit purposes.

[...]

In its analysis of BFDS reports, CAS underlines that the conclusions are reached not only from the analysis of the collected data, but also from the lack of explanations for player's behaviour or other factors related to the discrepancy between field action and the betting nature in markets. Another factor worth to be mentioned is the removal of some of [the Club's] games from big bookmakers by not quoting the games as a result of market irregularities.

Referring to the CAS decision, although it is noticed that there is room for improvement in the BFDS system, they are a solid proof confirming the direct or indirect inclusion of the club in match-fixing. For fighting the phenomenon of result fixing, it is not important for the trial panel to confirm the direct involvement of specific persons in fixing as the indirect involvement is equally punishable with regards to integrity.

The analysis of the Ethics Committee aims to prove the value of the BFDS reports. The Committee concludes that the generated reports will serve as an indication for initiating a disciplinary investigation, but their content and conclusions will be subject to the Commission's assessment on a case-by-case basis and validated only by a decision of the Ethics examination panel.

In this case, the examination panel has analysed the content of the BFDS reports involving [the Club] and related to competitions organized by [AFA], concluding that those reports whose conclusions are not supported by additional evidence of sporting nature but concentrate only in terms of betting should be excluded from the examination. Also, the Ethics Committee assesses that the reports concluding that bets played in order to manipulate the sports results have not been materialized should be excluded from this process".

The AFA Ethics Committee then presents a summary of the BFDS reports in respect of the following six matches:

- "KF Elbasani vs. [the Club] 1:4 (25.01.2015) "Kategoria Superiore"
- [The Club] vs. KS Flamurtari 3:1 (18.02.2015) "Albania's Cup"
- [The Club] vs. KF Tirana 2:1 (21.09.2015) "Kategoria Superiore"
- [The Club] vs. Tërbuni Pukë 4:0 (22.11.2015) "Kategoria Superiore"
- [The Club] vs. Vllaznia 2:1 (17.02.2016) "Albania's Cup"
- [The Club] vs. KF Laçi 2:1 (20.04.2016)"

"In order to deepen the investigation into these games, the Committee assessed that the presence of representatives of [the Club] to deal with the reports is indispensable. Thus, on 21.04.2017, the technical secretary informed the Club Manager, Mr. Ilir Permeti, and the goalkeeper Orges Shebi. [...]"

The present parties have been explained that the purpose of this session is to present the Club's stand on the investigation initiated by the Ethics Committee at [AFA] regarding allegedly fixed games of [the Club].

In summary, the positions of Mr. Permeti and Mr. Shehi was that the reported games were won with sweat on the playing field and that from the moment the team entered the field there is and there can be no knowledge about the fluctuation of the betting odds. The games listed by the Committee are won by [the Club] and no doubt can be raised on them. If the Club were to lose games, then there could be doubts of tolerance. The charges for fixing are completely unfounded. They highlighted also that there is no final sentence to the club or its officials.

In disciplinary sports decision-making, the accepted standard of evidence is not the one of reasonable doubt, but is that of "sufficient doubt". This standard of evidence has been unified by the jurisprudence of Court of Arbitration for Sports, for all integrity-related issues. In this context, the Ethics Committee's panel shall decide based on the conviction created on facts presented in this process.

In order to avoid any ambiguity, the violations committed under the Code of Ethics and the [AFA Disciplinary Code] shall be analysed with the standard that is above the probability balance and under "evidence beyond reasonable doubt". This standard is generally accepted by the Code of Ethics of the World Olympic Committee.

[...]

In the analysis of all the factors, the Committee failed to prove the direct or indirect involvement of a player or official of [the Club] in influencing the result of a game against the sport ethics. Despite this technical barrier, the Committee considers that there is room for establishing a new practice in line with Article 134/2 of the Disciplinary Code, a provision allowing the trial panel to decide as a "legislator" with the sole purpose of respecting the judicial principle that "the Court cannot refuse to examine and decisions on matters that are submitted for examination, with the justification that the law is absent, incomplete, has contradictions or is unclear".

The Ethics Committee, although underlining that the means available for punishing the phenomenon of fixed games, from a disciplinary and ethical point of view are quite limited, appraises that this phenomenon cannot be unpunished.

In its decision, the Ethics Committee has taken into account two fundamental aspects: firstly, the high number of club-generated reports and the national and international perception of the Club's relationship with the game fixing. Numerous BFDS reports contain detailed information on dubious betting trends drawn up by UEFA's main sports partner "Sportradar". This Swiss company is specialized in sports betting analysis and has a qualified staff certified by ISO 9001 in 2014.

Regarding the Club's attitude, the Committee has the opinion that it is general and does not reflect the details of the games being listed by BFDS reports. The fact that there is no final criminal decision is considered by the Committee as a secondary aspect. This is not just about prejudicing the innocence of [the Club] at the criminal level, but because the criminal and disciplinary examinations are two different aspects of justice. Criminal justice does not exclude the sport justice. This means that an event punishable from the point of view of sports ethics is not necessarily associated to the criminal sentence.

It is noted that in the case of the criminal case number 6923 / 2016, were exactly the reports of UEFA BFDS which served as a cause for registration of proceedings and not the criminal record that brought a

disciplinary and ethical investigation in accordance with the Ethics and Sport Discipline Code. During the investigation, the Committee appraised the information received from the reports as valid and exhaustive evidence whose proven strength is even greater when supported by other sports factors and not only [sic].

The Committee analysed film footage from games whose reports were found to be grounded and concluded that there were reasonable doubts that games had enough evidence for questioning their integrity as appropriate by not scoring when it was possible or facilitating the receiving goals when there were all possibilities for stopping the action.

In analyzing the content of the reports, the Committee judges that their conclusions are not only the result of exhaustive data analysis, but also the lack of normal explanations that would justify such fluctuations in betting, such as actions in the playing field or announcements or important news on the formation or the condition of a concrete player. For this reason, these behaviors can only be explained as related to fixing the sports results and the preliminary knowledge by the bookmakers of the game result.

It is highlighted that the Bet Fair Detection System [sic] reports are a solid tool in the fight against fixing and although there is room for improvement, there is a high chance that an escalating game is fixed. This possibility is sufficient for the Committee to establish the confidence that the Club is involved in this non-sportive conduct.

However, the perception of the public at the national and international level for the inclusion of the Club in fixing activities are very important. The sentencing of [the Club] by UEFA's Ethics and Disciplinary Body, whose decision was also confirmed by CAS, is an alert for the national football that questions the integrity of the game.

As above, the Examination Panel of the Ethics Committee of the [AFA] is sufficiently convinced that [the Club] is involved in fixing games against sports ethics. Due to the importance of violating and extension of the phenomenon for a significant part in the 2015/2016 football season the Committee concluded that the title "Champion" of Kategorija Superiore for this season should be rejected, pursuant to Article 16 of the [AFA Disciplinary Code] as it was gained as a result of game fixing.

Pursuant to Article 68/2 of the [AFA Disciplinary Code], [the Club] should be fined with a final of ALL 2.000.000 (two million Albanian Lek). The Examination Panel classifies the violation of the [Club] as a serious violation as provided by the second paragraph of the article and considers it necessary to apply as a supplementary punishment with reduction of 12 (twelve) points from final classification. Such measure shall be applied for the next season, i.e. that of 2016/2017".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

10. On 4 August 2017, the Club filed a Statement of Appeal, pursuant to Article R48 of the CAS Code of Sports-related Arbitration (the "CAS Code") with CAS. The Club nominated Mr Frans de Weger, Attorney-at-Law in Zeist, the Netherlands, as arbitrator.
11. On 14 August 2017, the Club filed its Appeal Brief, pursuant to Article R51 of the CAS Code, submitting the following requests for relief:

- “1- *The complete acceptance of the appeal against the Decision of date 23.06.2017 of the Albanian Football Association’s Ethics Committee.*
 - 2- *The reversing and annulment of the Decision of date 23.06.2017 of the Albanian Football Association’s Ethics Committee.*
 - 3- *All the procedural costs of the appeal to be carried out by the Respondent”.*
12. On 30 August 2017, in the absence of an arbitrator being nominated by AFA although having been invited to do so by the CAS Court Office, the parties were advised that, pursuant to Article R53 of the CAS Code, it would be for the President of the CAS Appeals Arbitration Division, or her Deputy, to nominate an arbitrator *in lieu* of AFA.
 13. On 7 September 2017, AFA filed its Answer, pursuant to Article R55 of the CAS Code, requesting CAS to decide as follows:

“[...] [T]he decision of the Ethics Committee of the Albanian Football Association should be upheld and the appeal filed by Klubi Sportiv Skënderbeu should be dismissed”.
 14. On 20 September 2017, further to an invitation from the CAS Court Office to express their views in this respect, the Club requested the Panel to hold a hearing, whereas AFA remained silent.
 15. On 27 September 2017, pursuant to Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the arbitral tribunal appointed to decide the present matter was constituted by:

Mr Ulrich Haas, Professor of Law in Zurich, Switzerland, as President;
Mr Frans de Weger, Attorney-at-Law in Zeist, the Netherlands; and
Mr André Brantjes, Attorney-at-law in Amsterdam, the Netherlands, as arbitrators
 16. On 13 November 2017, following a request of the Club to hear Mr Shulku, General Secretary of AFA, and Mr Nurishimi, Chief of Competitions of AFA, as witnesses, the Panel invited the Club to fill in a schedule, clarifying what questions it contemplated asking them and what the relevance of such questions would be for its case, following which AFA was invited to indicate its objections thereto, if any.
 17. On 23 November and 4 December 2017 respectively, the Club and AFA duly filled in the schedule as requested by the Panel.
 18. On 12 December 2017, the CAS Court Office informed the parties that the Panel had decided to allow for all the questions posed by the Club, as reported in the schedule enclosed to the Club’s letter dated 23 November 2017. AFA was requested to provide witnesses statements of Mr Shulku and Mr Nurishmi by 5 January 2018 and to make them available for examination at the hearing.

19. On 10 January 2018, the CAS Court Office informed the parties that AFA failed to file the requested witness statements within the time limit granted.
20. On 15 January 2018, the CAS Court Office, on behalf of the Panel: i) invited the parties to clarify on what date the Appealed Decision was notified to the parties; ii) invited AFA one last time to file witness statements of Mr Shulku and Mr Nurishmi; iii) invited AFA to file translations into English of several provisions referred to by AFA; and iv) invited AFA to submit the precise text of “the new norm” or “new practice” that had been formulated by the AFA Ethics Committee in order to combat match-fixing and that was applied to the Club, and to clarify whether this new rule/practice was communicated to the clubs.
21. On 18 January 2018, AFA i) informed the CAS Court Office that the Appealed Decision was notified to the Club on 15 July 2017; ii) provided the witness statements requested; iii) provided translations into English of the relevant provisions; and iv) stated the following in respect of the new rule/practice adopted by AFA in order to combat match-fixing:

“With regard to the “text of the new norm”, the position of [AFA] is that the responsibility of a club involved in match fixing should not be dependent solely on the personal responsibility of a player or club official. Accordingly, the “new norm” is that it is not necessary to find a specific player or official guilty in order to sanction a club if the panel is comfortably satisfied that the club is guilty of match fixing based on the reputable evidence such as those contained in the BFDS Reports.

Based on the above, the Chairman of the Ethics Committee proposed that amendments with that purpose are made to a revised edition of the disciplinary code which will then be communicated to the clubs in the normal fashion”.
22. Also on 18 January 2018, the Club informed the CAS Court Office that the Appealed Decision had been notified to it on 14 July 2017 and provided evidence thereof.
23. On 22 January 2018, both parties returned duly signed copies of the Order of Procedure to the CAS Court Office.
24. On 22 January 2018, a hearing was held in Lausanne, Switzerland. At the outset of the hearing both parties confirmed not to have any objection as to the constitution and composition of the Panel.
25. In addition to the Panel, Mr Daniele Boccucci, Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:
 - a) For the Club:
 - 1) Mr Ardjan Takaj, President;
 - 2) Mr Gehrard Takaj, General Manager;
 - 3) Mr Lorin Burba, Counsel

b) For AFA:

- 1) Mr Aldi Topçiu, AFA Head of Legal Department & Integrity Officer;
- 2) Mr William McAuliffe, Counsel

26. The Panel heard evidence of Mr Lysien Nurishmi, Chief of Competitions of AFA, and Mr Ilir Shulku, General Secretary of AFA, by telephone. Both witnesses were instructed to tell the truth. Both parties and the Panel had the opportunity to examine and cross-examine the witnesses.
27. At the start of the hearing, counsel for the Club presented translations of certain provisions of the Albanian Code of Administrative Procedure, the Law for Sport, and the operative part of a decision issued by the AFA Ethics Committee dated 10 February 2015, imposing a ban of six months from sporting activity on Mr Arjan Pisha, football player of KF Elbasani, for contemplating in influencing the result of the match KF Elbasani – KS Teuta (10 September 2017), KF Elbasani – the Club (25 January 2015) and KS Kukësi – KF Elbasani (31 January 2015).
28. AFA explicitly stated that it did not object to the admissibility of these documents, as a consequence of which the documents were admitted to the case file by the Panel.
29. Furthermore, AFA consented to exclude 10 BFDS reports from the case file, since the matches related to these reports were not relied upon by the AFA Ethics Committee in sanctioning the Club in the Appealed Decision.
30. The parties were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel.
31. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard had been respected.
32. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present award.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

33. The submissions of the Club, in essence, may be summarised as follows:
 - The arbitral proceedings in CAS 2016/A/4650 were purely of administrative nature, whereas the present proceedings are of disciplinary nature. With reference to the CAS Award issued in CAS 2016/A/4650, the Club maintains that *“an administrative measure is more generic than the one established for the disciplinary offense which, in line with its sanctioning*

character, is more restrictive and accurate". For disciplinary proceedings, the active role and direct involvement of the offender in committing the violation with a view to gaining an undue advantage for itself or a third party should be established. This as opposed to proceedings of administrative nature, where the direct involvement, the active role and commitment of the offender are not required. The standard of proof in administrative proceedings is comfortable satisfaction, while the standard of proof in disciplinary proceedings is of beyond a reasonable doubt.¹

- The CAS panel in CAS 2016/A/4650 concluded that BFDS reports produced by Sportradar can prove the direct or indirect involvement of a club in match-fixing activities, if corroborated with further evidence. It cannot be proven by the BFDS reports alone that the Club manipulated or attempted to manipulate any of the matches indicated by UEFA. The BFDS reports are valuable evidence in administrative proceedings, but cannot address and prove the culpability of the Club in disciplinary proceedings.
- AFA has limited knowledge of the BFDS and of the proceedings between the Club and UEFA that resulted in the arbitral award issued in CAS 2016/A/4650. AFA's contention that the CAS panel in CAS 2016/A/4650 took into account domestic matches in its analysis is not true. The Appealed Decision fails to mention which entity has instigated the disciplinary proceedings against the Club. The Appealed Decision only indicates that "[t]he Ethics Committee, based on the Code of Ethics and Code Sport Discipline, examined all the reports submitted by UEFA's BFDS".
- The AFA Ethics Committee concluded that the BFDS reports are conclusive evidence in disciplinary proceedings. According to AFA, the BFDS reports prove that six matches have been manipulated by the Club. The position of the AFA Ethics Committee is however inconsistent as it acknowledges that the reports cannot be considered proof beyond any reasonable doubt, but after failing to find evidence supporting the BFDS reports, still considers the BFDS as proof beyond any reasonable doubt. The AFA Ethics Committee also did not indicate a single person (an official or player of the Club) involved or allegedly involved in match-fixing activities.
- Several material violations were made by the AFA Ethics Committee. Article 13 AFA Code of Ethics solely prohibits match-fixing activities by natural persons. The consequences for any such violations are to be found in the AFA Disciplinary Code. While para 1 of Article 68 AFA Disciplinary Code provides for a range of sanctions for individuals, para 2 deals with the consequences for legal entities. Article 68(2) AFA Disciplinary Code requires that a club can only be sanctioned provided that the direct involvement of its players or officials are established. Thus, the provision substantially differs from the respective UEFA provision. It is not possible to interpret Article 68(2) AFA Disciplinary Code in line with the UEFA provision. The AFA Ethics Committee in complete violation of its rules and regulations considered it appropriate to apply

¹ The Panel notes that the Club did not refer to disciplinary proceedings but to administrative proceedings in its Appeal Brief, but the Panel considers this to be an obvious typo and that the Club intended to refer to disciplinary proceedings.

Article 134 AFA Disciplinary Code. Pursuant to this provision a “new rule” can be created, thus acting as legislator, in case no rule exists. However, in the case at hand there is a rule in place related to match-fixing. Thus, the Ethics Committee seized a prerogative that has not been attributed to it.

- Procedural violations took place. Assuming that the procedure against the Club was instigated by AFA *ex officio*, the Club maintains that it was not informed of the accusation against it, which is a fundamental principle under Albanian law and the Universal Declaration of Human Rights. The Club was also not informed of the evidence used against it, was not invited to present objections against the accusations, was not granted the right to present evidence, and was not granted the right to defend itself. The fact that a player and an official of the Club were invited to comment on the matches that were indicated as allegedly manipulated does not exclude AFA from the obligation of informing the Club of the accusations against it. After learning from the disciplinary proceedings initiated against it from the newspapers, the Club requested AFA to be provided with the full procedural file, which AFA failed to do without a reasonable explanation.
- No proper investigation took place. While AFA could have called almost 200 persons as witnesses, it only heard a player and an official of the Club. No players of the opposing teams or match officials have been heard. The BFDS reports have no regulatory status, no legal value, and are illegal. AFA does not have a contractual relationship with Sportradar, unlike UEFA presumably has. The video evidence relied upon by the AFA Ethics Committee consists only of match highlights of four out of the six matches referred to in the Appealed Decision. In respect of the match between the Club and KF Laçi, the video footage does not correspond to the actual match being investigated. Finally, no sports specialists have been called as expert witness for evaluating the exhibits.

B. The Respondent

34. The submissions of AFA, in essence, may be summarised as follows:

- The Club’s argument that no domestic matches were considered by the CAS panel in CAS 2016/A/4650 must be dismissed, because the CAS award was the result of an appeal filed against a decision of the UEFA Appeals Body that did take into account several domestic matches.
- The proceedings leading to the Appealed Decision were instigated by AFA, which, through its Integrity Officer and its Secretary General, requested the AFA Ethics Committee to open proceedings against the Club.
- AFA does not dispute that the Appealed Decision and the arbitral award issued in CAS 2016/A/4650 are of a different nature.

- It is not plausible that the Club was informed by local newspapers, because on 21 April 2017 the secretariat of AFA summoned the club officials for a hearing.
- With regard to the alleged procedural violations, there is no doubt about the legitimacy of the proceedings. The AFA Ethics Committee had the right to initiate proceedings *ex officio* and assured a fair trial within the framework of a disciplinary procedure, by granting the Club its right to be heard. A player and an official of the Club were heard and the chairman of the AFA Ethics Committee “*explained to the representatives that the object of this session is for the club to present its defense with regards to the started investigation from the Ethics commission near the AFA regarding the matches of [the Club] suspected as fixed*”. The player and the official of the Club testified that they had no knowledge of betting patterns. The Club won the relevant matches and no doubts can therefore be raised in respect of these matches.
- With regard to the alleged failure of the AFA Ethics Committee to conduct a proper investigation, the AFA Ethics Committee considered all the BFDS Reports involving the Club and analysed their validity by evaluating the seriousness of each report on a case-by-case basis. Video footage of each match was reviewed. Pursuant to Article 95 AFA Disciplinary Code, reports of match officials may be taken into account and are considered true and correct, although interested parties may present proof to the contrary. After analysing all the reports of the match officials, the AFA Ethics Committee concluded that only certain reports “*had grounds for truly being compromised for betting purposes*”. The AFA Ethics Committee simultaneously reviewed the BFDS reports and the match official reports, but “*did not draw any conclusion relevant to the match fixing because their main focus of course, remains the disciplinary aspect of the game. Nonetheless, the Ethics Committee has gained useful information by the BFDS reports that has helped it to create the conviction*”.
- With regard to the alleged material violations, “*the Ethics Committee is clearly convinced that the [Club] is guilty of influencing matches’ results against the sport ethics*”. With reference to Article 68 AFA Disciplinary Code, AFA submits that the Club can be held responsible for the actions of its officials and players. The AFA Ethics Committee was however “*not able to prove the direct or indirect involvement of a player or official of [the Club] in influencing the result of a match contrary to the sports ethics. Despite of this technical prevention, the commission finds that there is room for applying a new practice according to [Article 134(2) AFA Code of Sports Ethics], a provision which allows the court body to decide as “legislator”, with the sole intention of respecting the court principle that “The court cannot refuse to analyze and decide for cases presented for hearing, with the reasoning that the law is absent, incomplete, has discrepancies or is unclear*”.
- In its decision-taking the AFA Ethics Committee took into account two fundamental aspects: i) the high number of generated BFDS reports, and ii) the national and international perception on the Club’s relation to match-fixing. The AFA Ethics Committee “*agreed that the BFDS reports shall constitute valid proof in the war against match fixing and even though there is room for improvement, there is a high possibility that an escalated match is fixed. This possibility comfortably satisfies the Committee that the club is involved in this punishable non-sportive behaviour. It is therefore the case that the panel acquires the powers given by [Article*

134(2) AFA Code of Sports Ethics] *and creates a new precedent while admitting that direct evidence in relation to match fixing will be the exception rather than the standard, there will not be a necessity to confirm the participation of a player or an official in influencing the result of a game, in order to punish a club where the player or official pertains. This new norm does not mutate the existing one, but it empowers the Ethics Committee to address the issue of match fixing unreservedly*".

V. JURISDICTION

35. The jurisdiction of CAS, which is not disputed, derives from Article 18 AFA Code of Ethics (2012 edition) and Article 10(c) AFA Statutes (2007 edition).

36. Article 18 AFA Code of Ethics determines as follows:

- “1. *Ethics Commission decisions may be filed to appeal the Court of Arbitration for Sport except when the decision is given:*
 - a. *warning*
 - b. *reprimand*
 - c. *suspension for less than three matches or up to two months*
 - d. *a fine of less than 200.000 ALL*
2. *Decisions given by the [AFA Ethics Committee] not filed in the Court of Arbitration for Sport (CAS) within 21 days are final*”.

37. Article 10(c) AFA Statutes determines as follows:

“Any violation at national level deriving by or related to the application of the statute or regulations of [AFA] or any agreement, should be referred to an independent and unbiased court of arbitration, which is the Court of Arbitration for Sport in Lausanne, as specified in the relevant provisions of the statutes of FIFA and UEFA until the Albanian legislation has established an appropriate court of arbitration meeting the minimal requirements of FIFA and UEFA. The Court of Arbitration for Sport in Lausanne shall solve disputes instead of any other usual court, unless it is prohibited by the applicable legislation in Albania”.

38. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by both parties.

39. It follows that CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

40. The appeal was filed within the deadline of 21 days set by article 18(2) AFA Code of Ethics. The appeal complies with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.

41. Although the Club maintains that the grounds of the Appealed Decision were notified on 14 July 2017, whereas AFA maintains that the grounds were notified only on 15 July 2017, the Panel observes that since the Statement of Appeal was filed on 4 August 2017 the appeal was in any event filed within the deadline of 21 days.
42. It follows that the appeal is admissible.

VII. APPLICABLE LAW

43. Neither of the parties made any submissions in respect of the law to be applied.
44. Article R58 of the CAS Code provides the following:
“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.
45. The Panel is satisfied to accept that the present dispute shall be governed by the AFA Code of Ethics and the AFA Disciplinary Code.
46. In view of the fact that the Panel has not been provided with any regulatory provision determining the law to be applied in the matter at hand, the Panel finds that, pursuant to Article R58 of the CAS Code and since the Appealed Decision was rendered by the AFA Ethics Committee, Albanian law shall be subsidiarily applicable in case of any *lacuna* in the AFA Code of Ethics or the AFA Disciplinary Code.

VIII. PRELIMINARY ISSUES

47. The Club maintains that several procedural violations took place in the proceedings before the AFA Ethics Committee and that the Appealed Decision was rendered in complete violation of the Club’s right for a fair trial and the right to defend itself.
48. AFA maintains that it is consistent CAS jurisprudence that such procedural flaws, if any, could be cured in the proceedings before CAS due to its *de novo* power of review.
49. The Panel observes that the *de novo* power of CAS panels and the curing effect thereof has been interpreted consistently in CAS jurisprudence:

“The issue of the powers of the appeal panel has also been considered time and time again by CAS appeal arbitration tribunals when considering allegations of a denial of natural justice in the making of the original decision. An equally well accepted view has been taken that as it is a completely fresh hearing of the dispute between the parties, any allegation of denial of natural justice or any defect or procedural error (“even in violation of the principle of due process”) which may have occurred at first instance, whether within the sporting body or

by the Ordinary Division CAS panel, will be “cure” by the arbitration proceedings before the appeal panel and the appeal panel is therefore not required to consider any such allegations (see for example CAS 98 / 211, at para. [8]). [...]” (CAS 2008/A/1575, para. 32 of the abstract published on the CAS website).

50. The Panel fully subscribes to this oft-mentioned interpretation (e.g. CAS 2016/A/4387, para. 147 of the abstract published on the CAS website; CAS 2015/A/4187, para. 101 of the abstract published on the CAS website). In this case, the Club could bring before this Panel all elements that it could have brought before the AFA Ethics Committee – and no effect appears to remain uncured by the CAS proceedings. The Panel finds that, should there have been any procedural flaws in the proceedings before the AFA Ethics Committee in the proceedings leading to the Appealed Decision, such potential flaws are in any event repaired in the present proceedings because the Panel finds, and the parties confirmed at the end of the hearing, that their right to be heard had been fully respected in the present appeal arbitration proceedings. In light of the foregoing, the Panel is of the opinion that the Club’s submission based on several procedural violations that took place in the proceedings before the AFA Ethics Committee must be dismissed.
51. The Club also contends that the disciplinary proceedings were not instigated in accordance with the AFA Code of Ethics. The Panel observes that Article 16 AFA Code of Ethics determines that “*anyone who is aware of the information which may constitute a case for examination by the [AFA Ethics Committee] may submit it to [AFA]*” and Article 17 AFA Code of Ethics that “[*t*he Ethics Committee is entitled to take any measure provided by the Articles of Association of [AFA] and by the [AFA Disciplinary Code]”.
52. The Panel finds that this argument of the Club must also be dismissed, for the proceedings were at the very least opened *ex officio* by the AFA Ethics Committee, a competence allocated to the AFA Ethics Committee by the AFA Code of Ethics and, on a more subsidiary basis, by Article 41(1) of the Albanian Code of Administrative Procedures, pursuant to which “[*t*he administrative procedure is instigated by the request of a party or *ex officio*”.

IX. MERITS

A. The Main Issues

53. The main issues to be resolved by the Panel are:
- a) Did the AFA Ethics Committee validly establish a new practice in respect of match-fixing?
 - b) If so, should the Club be sanctioned for violating this new practice?
 - c) If so, is the sanction imposed on the Club proportionate?

a) ***Did the AFA Ethics Committee validly establish a new practice in respect of match-fixing?***

aa) *The regulatory framework*

54. The following regulatory framework governs the offence of match-fixing in the applicable rules and regulations of AFA.

Article 13 AFA Code of Ethics (headed: “*Betting and match fixing*”):

- “1. *Officials are prohibited to participate directly or indirectly in betting, gambling, lotteries or similar activities related to football matches in football categories where they participate to. They are prohibited participate [sic] to actively or passively in company, joint-ventures, organizations, etc. promoting, mediating, organizing or carrying out such activities.*
2. *Officials are prohibited to participate directly or indirectly in tries and attempts to fix the result of a football match or of a certain part of it”.*

Article 68 AFA Disciplinary Code (headed: “*Game fixing*”):

- “1. *Anyone who conspires to influence the result of a game contrary to sports ethics shall be punished by a suspension for a period of 6 (six) months, as well as a fine of ALL 1,500,000 (one million five hundred thousand Albanian Lek) up to ALL 3,000,000 (three million Albanian Lek). As with the confirmation of serious cases or cases of cooperation in an organized manner, offenders shall be punished with the permanent exclusion from the football activities.*
2. *In the case of confirming the participation of a player or official in influencing the result of the game in accordance with paragraph 1 of this article, a legal entity, association or club where the player or officer concerned pertains shall be punished with a fine of ALL 2,000,000 (two million Albanian Lek). In case of identifying serious cases or cases of cooperation in an organized manner, the legal entity, association or club concerned shall be punished with removal of 12 (twelve) points, exclusion from championship or competition or relegation to a lower category”.*

Article 134 AFA Disciplinary Code (headed: “*Scope of the Code, deficiencies and precedents*”):

“[...]

2. *If there is any deficiency in this code, the legal authorities shall take decision pursuant to the precedents previously created and in lack of precedents, pursuant to the rules that they would formulate for the said issues the same as they would be legislators”.*

55. It remained undisputed between the parties, and it was in fact explicitly stated in the Appealed Decision that “[i]n the analysis of all the factors, the Committee failed to prove the direct or indirect involvement of a player or official of [the Club] in influencing the result of a game against the sport ethics”.

56. As such, there is no doubt that Article 68(2) AFA Disciplinary Code is not directly applicable in the matter at hand, since this provision requires a confirmation of “*the participation of a player or official in influencing the result of the game in accordance with paragraph 1 of this article*”. Only if such prerequisite is complied with can a “*legal entity, association or club*” be sanctioned, which is, however, not the case.

57. In the absence of a legal basis in the AFA regulations to sanction the Club under such circumstances, the AFA Ethics Committee resorted to Article 134 AFA Disciplinary Code. This is confirmed in the Appealed Decision:

“Despite this technical barrier, the Committee considers that there is room for establishing a new practice in line with Article 134/2 of the Disciplinary Code, a provision allowing the trial panel to decide as a “legislator” with the sole purpose of respecting the judicial principle that “the Court cannot refuse to examine and decisions on matters that are submitted for examination, with the justification that the law is absent, incomplete, has contradictions or is unclear”.

ab) The discretion for decision-making bodies to act as legislator

58. The Panel notes that a provision such as Article 134 AFA Disciplinary Code is not an unknown concept in domestic laws and regulations and is therefore not invalid *per se*.

59. Indeed, Article 1(2) and (3) of the Swiss Civil Code (the “SCC”) for example determine as follows:

“2. In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator.

3. In doing so, the court shall follow established doctrine and case law”.

60. Article 1 SCC establishes a well-known principle in private law. According thereto, it is a given that statutory law is of a fragmentary nature. Article 1 SCC prevents a judge to hide behind this fragmentary nature of statutory law and to refuse to issue a decision where the legislator has (involuntarily omitted) to rule on the matter. Instead, in such circumstances a judge must – in application of a specific methodology – adjudicate the dispute by developing the law (just like a legislator). Thus, Article 1(2) and (3) SCC only apply to the field of civil or private law and, in addition, where the legislator involuntarily failed to regulate the matter.

61. Article 134 AFA Disciplinary Code grants the competent authority the discretion to act like a legislator in disciplinary matters. Whether this can be accepted appears questionable. A lot has been written on the legal nature of disciplinary proceedings. This Panel finds that the legal nature of such proceedings is distinct in nature. Evidence of this can be found in the jurisprudence of CAS whereby certain (but by far not all) principles of criminal law are applied to disciplinary proceedings by analogy (e.g. *lex mitior*).

62. The Panel is of course aware that one must be careful when applying principles of criminal law by analogy to disciplinary proceedings and that a balance of interests must be undertaken

to carefully analyse whether or not such principle fits into the particular legal coordinates. The purpose of disciplinary sanctions is to influence the behaviour of its members, in particular to encourage them not to engage in certain unwanted activity by threatening to sanction them. In order to achieve this goal, there must be clarity for all stakeholders on what constitutes misconduct. Furthermore, equal treatment of all members is only possible if there is legal certainty with respect to the contents of the rule. In order to protect the aforementioned interests, criminal law follows the principles of *nullum crimen, nulla poena sine lege scripta et certa*, pursuant to which no sanction may be imposed unless there is an express provision describing in sufficient clarity and specificity, not only the misconduct but also the applicable sanction. The Panel finds that this principle is applicable by analogy to disciplinary proceedings.

63. As maintained in CAS jurisprudence:

“It is well established that a sports governing body [...] such as the WKF may impose disciplinary sanctions upon its members if they violate the applicable rules and regulations. The power ‘to impose such sanctions is based upon the freedom of associations to regulate their own affairs’ (advisory opinion CAS 2005/C/976 & 986 para 25).

It is, however axiomatic that before a person can be found guilty of a disciplinary offence, the relevant disciplinary code must proscribe the misconduct with which he is charged. Nulla poena sine lege. [...]” (CAS 2014/A/3516, para. 103-104 of the abstract published on the CAS website).

64. While acknowledging the applicability of the above criminal principle in general terms, this Panel wishes to emphasize that not the same high criminal law standards with respect to legal certainty (“Bestimmtheitsgrundsatz”) apply to disciplinary proceedings. In the view of the Panel it suffices that the misconduct covered by the respective rule and the sanction applicable to such misconduct be determinable by interpretation. Thus, there remains a scope of applicability for Article 134 AFA Disciplinary Code. However, in the view of the Panel, the margin to act like a legislator in disciplinary proceeding is rather small.

ac) *The “new practice” implemented by the AFA Ethics Committee*

65. The Panel first and foremost notes that the precise text of the “new practice” referred to by the AFA Ethics Committee cannot be found in the Appealed Decision. The Panel invited the Respondent to formulate or submit the precise text of the “new practice” that the AFA Ethics Committee applied to the Club. The Panel is of the view that AFA failed to sufficiently clarify its new practice.

66. In its letter dated 18 January 2018, AFA informed the Panel as follows in respect of its new practice:

“With regard to the “text of the new norm”, the position of [AFA] is that the responsibility of a club involved in match fixing should not be dependent solely on the personal responsibility of a player or club official. Accordingly, the “new norm” is that it is not necessary to find a specific player or official guilty in order to sanction a club if the panel is comfortably satisfied that the club is guilty of match fixing based on the reputable evidence such as those contained in the BFDS Reports.

Based on the above, the Chairman of the Ethics Committee proposed that amendments with that purpose are made to a revised edition of the disciplinary code which will then be communicated to the clubs in the normal fashion”.

67. The Panel observes that this interpretation is formulated in a negative way, i.e. it states what is **not required** for a football club to be convicted for an offence related to match-fixing. Importantly, AFA however does not explain what **is required** for a football club to be convicted for an offence related to match-fixing.
68. The Panel finds that also during the hearing AFA was not able to clearly set out its new practice. The Club’s allegation that the amendment of the AFA Disciplinary Code was not scheduled to be discussed at the General Assembly set to take place in February 2018 remained undisputed by AFA. As such, even if there is a new practice, this practice will apparently not be codified in the near future and Mr Shulku and Mr Topciu verbally confirmed during the hearing that such new practice had in any event not yet been communicated to the club(s) at the time. The Panel considers this to be problematic from the perspective of legal certainty.
69. In any event, insofar the new practice applied by the AFA Ethics Committee entails that a football club can be sanctioned for the mere reason that suspicions are raised in respect of being indirectly involved in match-fixing, without any concrete substantiation as to why the club acted in a culpable way and without any evidence that its officials or players were involved in match-fixing, the Panel finds that such new practice is not permissible.
70. Such practice, i.e. sanctions based on suspicion, may be possible in the context of provisional measures, or, as referred to by the CAS panel in CAS 2016/A/4650, as an “administrative” measure or an admissibility requirement for taking part in a competition in order to protect the integrity of such competition, but not for the imposition of a definite disciplinary measure.
71. The Panel’s approach in this matter does not contradict the findings of the CAS panel in CAS 2016/A/4650. Instead, the opposite is true. The CAS panel in CAS 2016/A/4650 already noted that imposing definite disciplinary measures on a club without a concrete and specific breach would appear difficult:

“As maintained by UEFA, one of the pertinent differences between the two stages of the process described above is that for the first stage it is already sufficient for UEFA to declare a club ineligible to participate in its competitions if it comes to the conclusion that the club has been directly and/or indirectly involved in any activity aimed at arranging or influencing the outcome of a match at national or international level, whereas for the second stage a concrete and specific breach of the regulations is required” (CAS 2016/A/4650, para. 50; with further reference to CAS 2014/A/3625, para 124 of the abstract published on the CAS website).
72. In view of the Panel’s conclusion that it is not clear what constitutes the new practice of the AFA Ethics Committee and the fact that this new practice was not communicated to the Club, the Panel finds that the Club cannot be sanctioned based on such new practice. There must be legal certainty and the entities/persons subject to the AFA Code of Ethics and the AFA

Disciplinary Code must know what the practice is. This is all the more true considering the serious detrimental effects of the sanction in question.

73. The Panel, therefore, does not deem it necessary to examine the BFDS reports submitted by AFA in detail, because it is admitted by AFA that no direct evidence of any misconduct on the side of the Club can be derived therefrom, and that also no evidence can be derived therefrom that would justify sanctioning any players or officials of the Club.
74. The Panel further notes that the BFDS report issued for the match KF Elbasani v. the Club on 25 January 2015 (i.e. one of the matches relied upon by the AFA Ethics Committee to sanction the Club) refers to “*suspicious pre-match betting for KF Elbasani to lose this match*”, that there was “*suspicious live betting for KF Elbasani to lose the match and lose by at least two goals, in addition to at least three goals to be scored in total*”, and that there was “*poor defensive performance from KF Elbasani*”. No reference is made in this BFDS report to the Club, besides alluding to its “*suspicious history*”. Considering that Mr Arjan Pisha, football player of KF Elbasani, was sanctioned for contemplating influencing the result of the matches KF Elbasani – KS Teuta (10 September 2017), KF Elbasani – the Club (25 January 2015) and KS Kukësi – KF Elbasani (31 January 2015), the Panel fails to see in what way such a report would constitute evidence against the Club. Instead, it appears to the Panel that if one were to accept any new practice by the AFA Ethics Committee, such new practice should have resulted in KF Elbasani being sanctioned for the involvement of one of its players in a match-fixing scheme.
75. Finally, the Panel wishes to make clear that the reason for upholding the Club’s appeal is not based on the lack of admissibility or reliability of the BFDS reports as evidence in cases of match-fixing. Even less can this decision be qualified as a departure from the jurisprudence established by previous CAS panels. To the contrary, this Panel finds that the BFDS reports, generally speaking, are a valuable tool in the detection and subsequent sanctioning of match-fixing violations. However, just like any other evidence, also BFDS reports do not exempt a panel from carefully evaluating the evidence. In this case the Panel did not need to take this step, since AFA lacked already a proper legal basis for imposing a sanction.

B. Conclusion

76. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that the sanctions imposed on the Club by the AFA Ethics Committee in the Appealed Decision must be set aside.
77. In light thereof, the Panel does not deem it necessary to address the remaining questions set out above.
78. Any other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by KF Skënderbeu on 4 August 2017 against the decision issued on 23 June 2017 by the Ethics Committee of the Albanian Football Association is upheld.
2. The decision issued on 23 June 2017 by the Ethics Committee of the Albanian Football Association is set aside.
3. (...).
4. (...).
5. Any other and further motions or prayers for relief are dismissed.